

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DIONTAE JOHAN DUNCAN,

Plaintiff,

v.

T. CISNEROS, *et al.*,

Defendants.

Case No. 1:23-cv-01692-EPG (PC)

ORDER TO ASSIGN A DISTRICT JUDGE

AND

FINDINGS AND RECOMMENDATIONS TO
DISMISS THIS ACTION WITHOUT
PREJUDICE FOR FAILURE TO
PROSECUTE AND FAILURE TO COMPLY
WITH COURT'S ORDERS

(ECF No. 11)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY (30) DAYS

Plaintiff Diontae Johan Duncan is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983. For reasons stated below, the Court recommends that this case be dismissed without prejudice for failure to prosecute and failure to comply with a court order.

I. BACKGROUND

Plaintiff initially commenced this action on November 6, 2023, in the Sacramento Division of the United States District Court for the Eastern District of California. (ECF Nos. 1, 5). On December 6, 2023, the case was transferred to the Fresno Division. (ECF No. 5).

The Court screened Plaintiff's complaint on June 18, 2024, and concluded that it failed to state any cognizable claims. (ECF No. 11 at 10). Plaintiff was granted 30 days in which to

1 file an amended complaint or to inform the Court that he wished to stand on his original
 2 complaint. (*Id.* at 10-11). Plaintiff was advised of the requirements for an amended complaint
 3 and instructed that if he chose to stand on his original complaint, “the Court will issue findings
 4 and recommendations to a district judge consistent with this order.” (*Id.*). The Court also
 5 warned Plaintiff that, “Failure to comply with this order may result in the dismissal of this
 6 action.” (*Id.* at 11).

7 The deadline to respond to the Court’s screening order has now passed, and Plaintiff has
 8 not filed an amended complaint or a statement with the Court that he wishes to stand on his
 9 original complaint.

10 **II. LEGAL STANDARDS**

11 Under Federal Rule of Civil Procedure 41(b), a court may dismiss an action for failure
 12 to comply with court orders and to prosecute. In determining whether to dismiss an action
 13 under Rule 41(b) for failure to prosecute or failure to comply with a Court order, “the Court
 14 must weigh the following factors: (1) the public’s interest in expeditious resolution of
 15 litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to
 16 defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy
 17 favoring disposition of cases on their merits.” *Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th
 18 Cir. 2002) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260–61 (9th Cir. 1992)).

19 **III. ANALYSIS**

20 In applying the *Pagtalunan* factors to this case, the first factor weighs in favor of
 21 dismissal, because “[t]he public’s interest in expeditious resolution of litigation always favors
 22 dismissal.” *Id.* (quoting *Yourish v. California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999)
 23 (internal quotation marks omitted).

24 As to the second factor, the Court’s need to manage its docket, “[t]he trial judge is in
 25 the best position to determine whether the delay in a particular case interferes with docket
 26 management and the public interest.” *Id.* Here, Plaintiff has failed to file an amended complaint
 27 or otherwise notify the Court that he wants to stand on his complaint as required by a court
 28 order. Allowing this case to proceed further without any indication that Plaintiff intends to

1 prosecute this case is a waste of judicial resources. *See Hall v. San Joaquin County Jail*, No.
2 2:13-cv-0324 AC P, 2018 WL 4352909, at *2 (E.D. Cal. Sept. 12, 2018) (“The court will not
3 continue to drag out these proceedings when it appears that plaintiffs have no intention of
4 diligently pursuing this case.”). Therefore, the second factor weighs in favor of dismissal.

5 Turning to the third *Pagtalunan* factor, risk of prejudice to Defendants, “pendency of a
6 lawsuit is not sufficiently prejudicial in and of itself to warrant dismissal.” *Pagtalunan*, 291
7 F.3d at 642 (citing *Yourish*, 191 F.3d at 991). However, “delay inherently increases the risk that
8 witnesses’ memories will fade and evidence will become stale,” *Id.* at 643, and it is Plaintiff’s
9 failure to comply with a court order that is causing delay and preventing this case from
10 progressing. Therefore, the third factor weighs in favor of dismissal.

11 As for the availability of lesser sanctions, the fourth *Pagtalunan* factor, at this stage in
12 the proceedings there is little available to the Court which would constitute a satisfactory lesser
13 sanction while protecting the Court from further unnecessary expenditure of its scarce
14 resources. Monetary sanctions are of little use, considering Plaintiff’s *in forma pauperis* status.
15 (See ECF No. 9). And, given the stage of these proceedings, the preclusion of evidence or
16 witnesses is not available. Moreover, dismissal *without* prejudice *is* the lesser sanction available
17 to the Court. Under Federal Rule of Civil Procedure 41(b), a court may dismiss an action *with*
18 prejudice for failure to comply with court orders and to prosecute. Fed. R. Civ. P. (41)(b); *see*
19 *also Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962) (holding that Rule 41(b) allows *sua*
20 *sponte* dismissal by the Court because “[t]he authority of a court to dismiss *sua sponte* for lack
21 of prosecution has generally been considered an ‘inherent power,’ governed not by rule or
22 statute but by the control necessarily vested in courts to manage their own affairs so as to
23 achieve the orderly and expeditious disposition of cases.”) Therefore, the fourth factor also
24 weighs in favor of dismissal.

25 Finally, because public policy favors disposition on the merits, this factor weighs
26 against dismissal. *Pagtalunan*, 291 F.3d at 643.

1 **IV. CONCLUSION AND RECOMMENDATIONS**

2 After weighing the factors, the Court finds that dismissal without prejudice is
3 appropriate.

4 Accordingly, it is **RECOMMENDED** that:

- 5 1. This action be dismissed without prejudice under Federal Rule of Civil
6 Procedure 41(b) for failure to prosecute and failure to follow Court's orders; and
7 2. The Clerk of Court be directed to close this case.

8 These findings and recommendations will be submitted to the United States district
9 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
10 thirty (30) days after being served with these findings and recommendations, Plaintiff may file
11 written objections with the Court. The document should be captioned "Objections to Magistrate
12 Judge's Findings and Recommendations." Any objections shall not exceed fifteen (15) pages,
13 including exhibits. Plaintiff is advised that failure to file objections within the specified time
14 may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838–39 (9th
15 Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

16
17 IT IS SO ORDERED.

18 Dated: **October 23, 2024**

18 /s/ Eric P. Gray
19 UNITED STATES MAGISTRATE JUDGE